

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT DELOATCH, individually, and on behalf of others members of the general public similarly situated,) Civil No. 07cv713 DMS (NLS)
Plaintiffs,)
v.)
NATIONAL STEEL AND SHIPBUILDING)
COMPANY, a Nevada corporation,)
GENERAL DYNAMICS CORPORATION, a)
Delaware corporation, TECHNICAL AID)
CRYSTAL, INC., a Massachusetts)
corporation, 888 CONSULTING GROUP,)
INC., a Massachusetts corporation, and)
DOES 1 through 10, inclusive,)
Defendants.)
**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL AND
GRANTING REQUEST FOR
SANCTIONS**
[Doc. No. 22]

Plaintiff Robert Deloatch (Plaintiff) has brought this motion to compel Defendants Technical Aid Crystal, Inc. (TAC) and 888 Consulting, Inc. (888) (collectively, Defendants) to respond to Plaintiff's first set of interrogatories and first set of requests for production of documents (RFP). Plaintiff seeks discovery that could be relevant to his motion for class certification, which is currently due to be filed by January 31, 2008. The parties' counsel are located in different counties and could not arrange to personally meet and confer. In bringing this motion, Plaintiff asks that the Court: (1) order Defendants to further respond to discovery by a date certain; (2) continue the deadline to file the motion for class certification; and (3) award sanctions against Defendants. Defendants responded, agreeing to respond to all but two of the discovery requests, but not proposing a date by which to do so.

The Court vacated the November 16, 2007 hearing and took the matter under submission. For the following reasons, the Court **GRANTS** in part and **DENIES** in part Plaintiff's motion to compel.

BACKGROUND

The Discovery Requests.

Plaintiff propounded the identical three interrogatories and 52 RFPs on TAC and 888 on July 25, 2007.¹ After being granted an extension of time, Defendants responded on September 4, 2007. All the responses, except for one, contained objections. The majority of the responses, specifically responses to interrogatory nos. 1-2 and RFP nos. 2, 6-10, 12, 15-20, 22-32, 35-42, 44-45, 48-51, included this statement: “After entry of an appropriate protective order incorporating terms of non-disclosure and use of the responsive documents, [Defendants] will [respond or produce].”

Defendants responded to interrogatory no. 3. They also agreed to provide responsive documents to RFP nos. 1, 3, 4, 5 and 46. Initially they completely objected to RFP nos. 11, 13, 14, 21, 33, 34, 43, 47 and 52.

Counsel's Communications.

Following Defendants' objections, counsel engaged in a series of communications. Defendants' counsel, William Halle, sent Plaintiff's counsel, Matthew Theriault, an email on September 5, stating that he expected they could agree on the terms of a protective order soon, and that he would like to discuss such an order. He suggested Theriault contact him the "next week or later." About two weeks later, Theriault called Halle and left a message. Halle's colleague, Amy Larkin, returned Theriault's call on September 24. Theriault said he would forward a draft stipulated order to them.

On October 1, Theriault's associate, Lory Ishii, sent a meet and confer letter and proposed protective order to Halle. Halle did not respond. On October 5, Theriault sent Halle an email and attached his proposed protective order. Halle responded the next day, saying that he received Ishii's letter and would respond by October 9. Halle did not respond. Then, on October 11, Theriault sent him another email informing him of his intent to file a motion to compel if he continued to fail to respond. Halle wrote back at 2:47 a.m. the next day, saying he had received documents and was having them

¹ Because the discovery requests are identical, the Court will refer to them only by number and not distinguish by Defendant. The Court's order, however, will apply to all four discovery requests.

Bates stamped so as to send them out “tomorrow.”² He also said he was expecting more documents and would comment on the protective order and meet and confer on it by the end of the day. But Halle never did. Then, on Tuesday, October 16, Theriault sent Halle another email stating that he still had no response from him and confirmed he was preparing to file a motion to compel on Friday, October 19.

Theriault never heard another word from Halle, either in response to his communications or to provide the documents he said he would provide. Halle acknowledged that he “did Mr. Theriault a disservice” and that “[a]fter enough silence, and I think understandably, Mr. Theriault filed the motion to compel. Mr. Theriault deserved more than that silence.” Halle Declaration ¶¶ 6, 7. In fact, Halle “accepts at least partial responsibility for triggering this Motion.” Defs.’ Mem. Ps&As p.4, ll.24-25.

DISCUSSION

Interrogatories.

Defendants answered interrogatory no. 3. Regarding interrogatory no. 1, Defendants responded that they had no objection to producing the information to a third party administrator pursuant to a protective order. As for interrogatory no. 2, Defendants agreed to produce the information subject to the confidentiality provisions of a protective order.

The Court **GRANTS** Plaintiff’s motion to compel Defendants to respond to interrogatory nos. 1 and 2 by a date certain, and subject to a protective order that includes provisions governing a third party administrator and confidentiality. By separate order the Court shall enter a protective order that Plaintiff shall submit forthwith, as explained below.

RFPs.

In Defendants’ opposition they either reaffirmed their agreement to produce or agreed to produce documents for most of the RFPs in dispute. They reaffirmed that subject to a protective order, they would produce responses to RFP nos. 2, 6-10, 12, 15-20, 22-32, 35-42, 44-45 and 48-51. Specifically for RFP no. 2, they said that instead of identifying “[a]ll documents identifying each and every company within California with which Defendant contracted with to provide non-exempt employees”—which Defendants claim would be almost all documents in all of Defendants’ employee files—they propose to

² The Court assumes that Halle meant he would send them out on Friday, October 12, since he wrote the email in the early morning of October 12, and October 13 was a Saturday.

1 simply identify via compilation their California customers subject to a protective order. In addition,
 2 Defendants agreed that subject to a protective order, and where production would be more appropriate
 3 via a third party administrator or in the form of a compilation rather than through specific documents, to
 4 produce documents in response to RFP nos. 11, 13, 14, 21, 33, 34 and 47.

5 The Court **GRANTS** Plaintiff's motion to compel Defendants to respond to these RFPs by a date
 6 certain, and subject to a protective order that includes provisions governing a third party administrator
 7 and confidentiality. The responses may be in the form of compilations where Defendants represented it
 8 would be less burdensome.

9 **RFP No. 43.**

10 RFP No. 43 asks for “[a]ll documents showing final payments to each non-exempt employee
 11 after termination of employment since 3/14/03.” Defendants object on the grounds that the RFP seeks
 12 confidential financial and confidential proprietary information. Specifically, they contend that these
 13 documents would reveal the identities of their California employees and customers. In reply, Plaintiff
 14 has agreed to restrict this request from “all documents” to include only “all final wage statements.”

15 Defendants are already revealing their employees' and customers' names to Plaintiff in response
 16 to other discovery requests and subject to the provisions of a protective order. Therefore, the Court
 17 **GRANTS** Plaintiff's motion to compel a response to RFP No. 43 to the extent it calls for only “final
 18 wage statements,” and subject to a protective order that includes provisions governing confidentiality.

19 **RFP No. 52.**

20 RFP No. 52 seeks “[a] statistically relevant sampling of the files of non-exempt employees,
 21 including their personnel files, time sheets and other records of time actually worked, pay stubs and
 22 wage statements.” Defendants object on the grounds that the RFP seeks confidential, proprietary and/or
 23 financial information that would violate Defendants and/or other parties' privacy rights, and that it is
 24 unduly burdensome and oppressive. They also contend the RFP is fatally vague and ambiguous because
 25 it requires expert testimony to ascertain what is a “statistically significant sample.”

26 Plaintiff says that the term “statistically relevant sampling” is not vague or ambiguous because
 27 Plaintiff defined it in his October 1, 2007 meet and confer letter. Plaintiff defined it as “a method of
 28 producing a set of data that will provide statistically significant and accurate figures or numbers,

1 pertaining to the type of information that is sought, which may be too numerous for Defendants to
 2 produce in its entirety.” Plaintiff said the “method” would essentially be in the form that Defendants
 3 proposed for producing other responsive information. *See* Ellis Decl. ¶ 11.

4 The Court finds the term “statistically relevant sampling” to be vague and ambiguous, and finds
 5 no support for that statement in the case Plaintiff cites, *Savagio v. Wal-Mart Stores, Inc.*, 149 Cal. App.
 6 4th 588 (2007). The Court, therefore, **DENIES without prejudice** Plaintiff’s motion to compel a
 7 response to RFP No. 52 because the term “statistically relevant sampling” is vague and ambiguous and
 8 calls for an expert opinion, and because production of all the information requested in RFP No. 52
 9 would be oppressive and unduly burdensome for purposes of conducting discovery on class
 10 certification. The Court, however, will order Defendants to provide the Excel spreadsheet Nathan Ellis
 11 describes in his Declaration, paragraph no. 11, to Plaintiff.

12 **The Protective Order.**

13 The Court has reviewed both proposed protective orders. The Court chooses to adopt Plaintiff’s
 14 proposed protective order. Plaintiff, however, shall resubmit the proposed protective order to reflect
 15 these changes:

16 Paragraph No. 13(a) shall read: “Providing the full name, last known
 17 address, phone numbers, and dates of employment of each and every
 18 person employed by Defendants as a non-exempt employee (“Class
 19 Members”) within the state of California from March 14, 2003 until
 20 present to a mutually agreeable third party administrator within 15
 business days after entry of this Order by the Court, and providing the
 social security number of the Class Members to the third party
 administrator within 30 calendar days after entry of this Order by the
 Court.”

21 Paragraph No. 13(h) shall read: “The Parties shall divide equally the costs
 22 of administering all aspects of the Notice (i.e. Plaintiff shall bear one-half
 the cost and Defendants shall bear one-half the cost.”

23 Parties shall add a Paragraph No. 14 that reads: “Nothing shall be filed
 24 under seal, and the court shall not be required to take any action, without
 25 separate prior order by the Judge before whom the hearing or proceeding
 26 will take place, after application by the affected party with appropriate
 27 notice to opposing counsel. If the Court grants a party permission to file
 28 an item under seal, a duplicate disclosing all non-confidential information
 shall be filed and made part of the public record. The item may be
 redacted to eliminate confidential material from the document. The
 document shall be titled to show that it corresponds to an item filed under
 seal, e.g., “Redacted Copy of Sealed Declaration of John Smith in Support
 of Motion for Summary Judgment.” The sealed and redacted documents
 shall be filed simultaneously.”

1 Plaintiff shall lodge the revised proposed protective order within one week of the signed date of
 2 this Order.

3 **Sanctions.**

4 Plaintiff also requests that the Court order Defendants to pay the attorneys' fees Plaintiff
 5 incurred in filing this motion to compel. Plaintiff states that the fees total \$5,885.00, broken down at
 6 these rates:

- 7 ● Twelve hours for an associate with one and a half years experience who bills at
 8 the rate of \$330 per hour [Theriault Decl. ¶ 11]; and
- 9 ● Five hours for Mr. Theriault, an attorney with over six years experience who bills
 10 at a rate of \$385 per hour [Theriault Decl. ¶ 12].

11 Theriault's estimate of five hours included three hours of already-completed work and two hours
 12 **estimated** to prepare for and attend the hearing on this matter. Because the Court did not hold a
 13 hearing, the Court will consider only three hours of Theriault's work, for a total fee award of \$5,115.00.

14 Federal Rule of Civil Procedure 37(a)(4)(A) states that if a Court grants a motion to compel,

15 or if the disclosure or requested discovery is provided after the motion was
 16 filed, the court shall, after affording an opportunity to be heard, require the
 17 party . . . or attorney advising such conduct or both of them to pay to the
 18 moving party the reasonable expenses incurred in making the motion,
 19 including attorneys' fees, unless the court finds that . . . the opposing
 20 party's non-disclosure, response or objection was substantially justified, or
 21 that other circumstances make an award of expenses unjust.

22 Here, while Theriault waited a little over two weeks to contact Halle after Defendants served
 23 their responses, it was Halle who told Theriault to contact him "next week or later." Halle Decl. Ex. 1.
 24 It was then Halle who admittedly delayed and failed to communicate **at all**, even to request additional
 25 time to respond. Had Halle given Theriault any sort of response, it seems then the parties could have
 26 resolved almost all their disputes without drawing on the Court's time and resources. Accordingly,
 27 finding no substantial justification for Halle's silence, the Court **GRANTS** Plaintiff's request for
 28 reasonable attorneys' fees in the amount of \$5115.00.

29 **Filing Deadline.**

30 In light of the time anticipated to notify the prospective Class Members, the Court finds good
 31 cause to vacate and reset the January 31, 2008 deadline for Plaintiff to file a motion for class

1 certification.

2 **CONCLUSION**

3 For the foregoing reasons, the Court **ORDERS**:

- 4 1. Plaintiff shall lodge his proposed protective order, incorporating the Court-ordered
5 changes, by **November 28, 2007**.
- 6 2. Defendants shall respond to interrogatory no. 1 as provided in paragraph no. 13(a) of the
7 protective order.
- 8 3. Defendants shall respond to interrogatory no. 2 by **December 5, 2007**.
- 9 4. Defendants shall produce the documents that they said they would produce in response to
10 RFP nos. 2, 6-10, 12, 15-20, 22-32, 35-42, 44-45 and 48-51 by **December 5, 2007**.
- 11 5. Defendants shall produce the documents in response to RFP nos. 11, 13, 14, 21, 33, 34
12 and 47 by **December 5, 2007**.
- 13 6. Defendants shall produce documents in response to RFP No. 43 to the extent it calls for
14 only “final wage statements” by **December 5, 2007**.
- 15 7. Defendants shall provide the Excel spreadsheet Nathan Ellis describes in his
16 Declaration, paragraph no. 11, to Plaintiff within 15 business days after entry of this
17 Order.
- 18 8. Defendants shall pay the sum of **\$5,115.00** for reasonable attorney’s fees directly to
19 Initiative Legal Group LLP by **November 28, 2007**.
- 20 9. The January 31, 2008 deadline by which Plaintiff must file his motion for class
21 certification is **VACATED** and **RESET** for **May 1, 2008**. All other provisions of the
22 Court’s August 3, 2007 Scheduling Order remain in full force and effect.

23 **IT IS SO ORDERED.**

24 DATED: November 21, 2007

25 
26 Hon. Nita L. Stormes
27 U.S. Magistrate Judge
28